

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
AT&T's Petition for Declaratory Ruling	)	WC Docket No. 02-361
Concerning Phone-to-Phone IP Telephony	)	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> hereby files its initial comments in the above-captioned proceeding.<sup>2</sup> NTCA urges the Federal Communications Commission (Commission or FCC) to dismiss AT&T's petition for declaratory ruling. The petition is a preemptive attempt to evade paying legitimate access charges and avoid making lawful universal service fund (USF) contributions under the Commission's existing and prospective rules. AT&T couches its petition as request for exemption from existing access charges, but if adopted, it would have an increasingly severe effect on universal service and separations. The Commission should therefore refer the USF and separations issues masked in the petition to the Federal-State Joint Boards on Universal Service and Separations for recommendations. The Commission should also include the comments in this proceeding as part of the record in its Notice of Proposed Rulemaking (NPRM) concerning a unified intercarrier compensation mechanism.<sup>3</sup> NTCA recognizes that various types of voice-over Internet protocol

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 555 rural rate-of-return regulated telecommunications providers. All of its members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). All of NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> *In the Matter of AT&T's Petition for Declaratory Ruling Concerning Phone-to-Phone IP Telephony*, Public Notice, WC Docket 02-361 (Nov. 18, 2002).

<sup>3</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC

(VOIP) services are emerging and the future application of access charges to these types of services should be thoroughly considered in the intercarrier compensation NPRM. Finally, the Commission should classify phone-to-phone IP telephony service as “telecommunications service” and require all providers of such service to pay all applicable access charges and make all appropriate contributions to the universal service funding mechanisms.

## **I. INTRODUCTION**

On October 18, 2002, AT&T filed a petition for declaratory ruling requesting that its phone-to-phone Internet protocol (IP) telephony services be exempt from access charges.<sup>4</sup>

AT&T claims that its phone-to-phone IP telephony services are transmitted over the same Internet backbone facilities that carry Internet service provider (ISP) traffic and therefore should not be subject to interstate access charges. AT&T is wrong.<sup>5</sup>

## **II. PHONE-TO-PHONE IP TELEPHONY SHOULD BE CLASSIFIED AS “TELECOMMUNICATIONS SERVICE”**

Phone-to-phone IP telephony service creates a virtual transmission path between two local loops in the public switched telephone network (PSTN) that provide facilities to originate and terminate a telephone call. Indeed, the New York Public Service Commission (NYPSC) has determined that certain phone-to-phone IP telephony service has all the characteristics of a “telecommunications service” and “imposes the same burdens on the local exchange as do other interexchange carriers and should pay all applicable and appropriate charges paid by other long distance carriers, including access charges.”<sup>6</sup>

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Docket No. 01-92, FCC 01-132 (rel. April 27, 2001)(NPRM).

<sup>4</sup> *In the Matter of AT&T’s Petition for Declaratory Ruling Concerning Phone-to-Phone IP Telephony*, WC Docket No. 02-361, AT&T Petition (filed Oct. 18, 2002).

<sup>5</sup> *Id.*, p. 24.

<sup>6</sup> *Complaint of Frontier Telephone Company of Rochester Against DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, CASE 01-C-1119, p. 9 (May 31, 2002).

US DataNet Corporation (DataNet) provides phone-to-phone IP Telephony service in New York. DataNet's corresponding network configuration for a customer making a long distance voice call includes the following:

1. The call goes over an incumbent local exchange carrier's (ILEC's) local loop serving the customer placing the call.
2. It then goes from the ILEC's local central office where the call is switched.
3. The switched call goes over the ILEC's interoffice trunks to the ILEC's tandem.
4. The call then is switched by the tandem and routed over an intercarrier trunk to a competitive local exchange carrier's (CLEC's) switch.
5. In the CLEC's switch, the call goes over local access facilities leased by DataNet from the CLEC and then is delivered to DataNet's IP network.
6. DataNet takes the signal from the CLEC and converts it to IP for transmission over its system. At the terminating end, the protocol is converted back to a signal compatible with the PSTN.
7. Approximately 40% of the time, DataNet's IP network does not serve the called party's local calling area, in which case, DataNet uses the facilities of interexchange carriers to complete its calls, and therefore no protocol conversion is used or needed.<sup>7</sup>

Furthermore, DataNet holds itself out as providing voice telephony service that allows customers to call telephone numbers assigned in accordance with the North American Numbering Plan. It creates a virtual transmission path between two points on the PSTN using packet-switched IP technology when necessary. And, it uses the same local loop in the PSTN as all other interexchange carriers (IXCs).<sup>8</sup> From a DataNet customer's standpoint there is no net change in form or content of their voice transmissions using DataNet's phone-to-phone IP telephony service.

AT&T's phone-to-phone IP telephony services are virtually the same as DataNet's service. AT&T's phone-to-phone IP telephony subscribers use customer-dialed, voice communications services that use the public circuit switched network in the same manner as traditional switched voice services. There is no evidence that AT&T's phone-to-phone IP

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<sup>7</sup> *Id.*, p. 5.

<sup>8</sup> *Id.*, p. 6-8.

telephony services use the local exchange network in a manner different than its traditional long distance services.

In the Commission's previous analysis and report to Congress concerning phone-to-phone IP telephony and telecommunications services it stated that:

We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP telephony, that most closely resemble traditional basic transmission offerings. The Commission to date has not formally considered the legal status of IP telephony. The record currently before us suggests that certain "phone-to-phone IP telephony" services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."<sup>9</sup>

The Commission also found that an entity offering a simple, transparent transmission path, without capability of providing enhanced functionality, offers "telecommunications."<sup>10</sup> It further determined that certain protocol processing services that result in no protocol conversion to the end-user are deemed "telecommunications services".<sup>11</sup>

This functional approach is consistent with Congress' intent that the classification of a service should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using the PSTN, the Internet, wireless, cable, satellite, or some other infrastructure. Its classification should depend on the nature of the service being offered to customers. If the customer can receive nothing more than a pure voice transmission, the service is a "telecommunications service." If the customer can

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<sup>9</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 83, CC Docket 96-45, 13 FCC RD 11501 (rel. April 10, 1998).

<sup>10</sup> *Id.*, ¶ 39.

<sup>11</sup> *Id.*, ¶ 50. The Act defines "telecommunications services" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used. The Act also defines "telecommunications" as the transmission between the user of information of the user's choosing, without change in the form or content of the information sent or received. The Act further defines "information service" as the "offering of capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not include any use of any such capability for the management, control or operation of the

receive enhanced functionality, such as a manipulation of information and interaction with stored data, the service is an “information service.”

Moreover, users of phone-to-phone IP telephony pay a fee for the sole purpose of sending and receiving voice transmissions without change in form or content. From the customer’s perspective, these services and service providers are identical to traditional circuit-switched service and telecommunications carriers.<sup>12</sup> To the extent that that certain forms of phone-to-phone IP telephony service are “telecommunications services” and to the extent the providers of those services obtain the same circuit switched access as obtained by other IXC’s, it is reasonable for the Commission to find that certain phone-to-phone IP telephony providers should “pay similar access charges”<sup>13</sup>

In reviewing the issues raised AT&T petition and the DataNet decision it is clear that:

1. Phone-to-phone IP telephony providers hold themselves out as providing voice telephony service.
2. Phone-to-phone IP telephony customers do not use enhanced functionality.
3. Phone-to-phone IP telephony customers are not required to use customer premise equipment (CPE) different from the CPE used to place ordinary calls over the PSTN.
4. Phone-to-phone IP telephony customers place calls to telephone number assigned in accordance with the North American Numbering Plan.
5. Phone-to-phone IP telephony providers use the same circuit-switched access as obtained by other IXC’s and impose the same burdens on the ILEC local exchange as do other IXC’s and wireless carriers.

Phone-to-phone IP telephony service is a transparent telecommunications service that is virtually identical to traditional circuit-switched telecommunications service. Its traffic uses the local network just like all other IXC traffic subject to access charges. The fact that AT&T and DataNet offer phone-to-phone IP telephony service directly to the public for a fee, further demonstrates that it should be classified as a “telecommunications service.” NTCA therefore

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telecommunications system or management of telecommunications service.” *Id.*, ¶ 30.

<sup>12</sup> *Id.*, ¶ 101.

<sup>13</sup> *Id.*, ¶ 91.

recommends that the Commission classify phone-to-phone IP telephony service as “telecommunications service” and require providers of such service to pay all applicable access charges and make all appropriate contributions to the universal service funding mechanisms.

### **III. THE FCC SHOULD REFER ISSUES RAISED IN THIS PROCEEDING TO THE FEDERAL-STATE JOINT BOARD ON SEPARATIONS**

AT&T’s petition raises serious questions concerning separations that should be referred to the Federal-State Joint Board on Separations. AT&T claims that phone-to-phone IP telephony makes up approximately 5 percent of all interexchange calls.<sup>14</sup> If, as expected, the percentage of VOIP interstate calls increases over time and if phone-to-phone IP telephony calls became exempt from access charges, ILECs would lose a substantial amount of interstate revenues needed to recover the growing costs of phone-to-phone IP telephony and other VOIP interstate usage on their networks. A ruling now exempting phone-to-phone IP telephony services from access charges would therefore shift the burden of paying a growing amount of interstate costs from the interstate jurisdiction to the intrastate jurisdiction or to universal service over the next 1-3 years. NTCA urges the Commission not to unintentionally decide this separations issue in isolation. The Commission should first refer separations issues incident to AT&T’s petition to the Federal-State Joint Board on Separations for its recommendation prior to ruling on whether or not to exempt IP telephony calls from access charges.<sup>15</sup>

Exempting phone-to-phone IP telephony and other VOIP service from access charges without first accounting for jurisdictional separations would likely result in improperly preempting state commission jurisdiction and raise issues of confiscation.<sup>16</sup> The Commission should not unintentionally mandate reciprocal compensation or any other type of cost recovery

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<sup>14</sup> AT&T Petition, p. 4.

<sup>15</sup> *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65 (1930).

<sup>16</sup> *Id.*

for the obvious use of local networks without considering the jurisdictional cost shifts involved. In *Smith v. Illinois*, the Supreme Court stated that "proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction" to determine whether rates would result in confiscation.<sup>17</sup> The Court held that when distinct jurisdictional limits exist as to the determination of reasonable rates, some form of jurisdictional separations must occur. The Court further established that "reasonable measures [are] essential" and indicated that such measures should not "ignore altogether the actual uses to which the property is put."<sup>18</sup> The Commission's actions in this proceeding should therefore take into consideration state commission jurisdiction and the separation of carrier property and expenses between interstate and intrastate operations in order to avoid issues of preemption and confiscation. Referring the NPRM to the Joint Board on Separations would assist the Commission in properly addressing these issues and avoid unnecessary litigation.

#### **IV. THE FCC SHOULD REFER ISSUES RAISED IN THIS PROCEEDING TO THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE**

Section 254(a)(1) of the Act directs the Commission to refer to Federal-State Joint Board on Universal Service for recommendation FCC proceedings that would change any of its regulations used to implement the universal service provisions in the Act. The issues raised in AT&T's petition would materially change the regulations in which providers of interstate services contribute to the USF. Exempting phone-to-phone IP telephony and other VOIP traffic from access charges would eliminate a specific type of long distance calls and providers from any requirement to contribute to the universal service funding mechanisms. Such a determination would create a regulatory arbitrage incentive for all long distance providers to remove all traffic from the PSTN to an IP platform to avoid paying access charges and making

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<sup>17</sup> *Id.*

universal service contributions.<sup>19</sup> It would further increase the universal service burden on all remaining USF contributors and increase their contribution rates to a much higher level than their rates today. As a consequence the future viability of universal service would be at stake. The Commission should therefore refer the issues raised in this proceeding to the Joint Board on Universal Service for its recommended decision prior to ruling on VOIP access issues.

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<sup>18</sup> *Id.*

<sup>19</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, ¶ 98, CC Docket 96-45, 13 FCC RD 11501.



## V. CONCLUSION

The Commission should dismiss AT&T's petition for declaratory ruling and include the comments in this proceeding as part of the record in the intercarrier compensation NPRM. The Commission should also refer the universal service and separations issues raised in this proceeding to the Federal-State Joint Boards on Universal Service and Separations for their recommendations. Finally, the Commission should classify phone-to-phone IP telephony service as "telecommunications service" and require providers of such services to pay all applicable access charges and make all appropriate contributions to the universal service funding mechanisms.

Respectfully submitted,

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December 18, 2002

## CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 02-361, DA 02-3334 was served on this 18th day of December 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy

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